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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1863

W. R. (BILL) SHORE, d/b/a
SHORE OIL PRODUCTS, et al., *Petitioners*
v.
LONGVIEW REFINING COMPANY, et al., *Respondents*

On Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. A) is unreported. The judgment and findings of fact and conclusions of law of the United States District Court for the Eastern District of Texas (Pet. App. C and D, respectively) are also unreported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on February 15, 1977. On March 23, 1977, a petition for rehearing and a suggestion of rehearing *en banc* were denied (Pet. App. B and Resp. App. A, respectively). The petition for a writ of certiorari was initially filed on May 12, 1977. Petitioners were subsequently directed to file a corrected version of their petition and did so on June 27, 1977. The jurisdiction of the Court is invoked under 15 U.S.C. (Supp. V) §754(a)(1).

QUESTIONS PRESENTED

1. Whether the Temporary Emergency Court of Appeals was correct in holding that the Economic Stabilization Act of 1970 requires that a purchaser present a claim for refund to a seller and wait for a ninety-day period prior to instituting a civil action for recovery of an overcharge, unless the purchaser is able to demonstrate that the overcharge was "willful" in a criminal sense?

2. Whether the Temporary Emergency Court of Appeals was correct in holding that the trial court erred in failing to find the specific amount of overcharges in a sum certain as to each petitioner?

3. Whether the Temporary Emergency Court of Appeals was correct in holding that the trial court erred, with respect to alleged violations during the so-called formula period, in misapplying Agency regulations?

STATUTES AND REGULATIONS INVOLVED

The relevant statutes, §§208 and 210 of the Economic Stabilization Act of 1970, as amended (Stabilization Act), 12 U.S.C. (Supp. V) §1904 note, are set forth in their entirety in the opinion of the Temporary Emergency Court of Appeals (Pet. App. A at 13 n.19 and at 7-8 n.10, respectively). The regulations relevant to the Temporary Emergency Court of Appeals' reversal of the trial court's judgment are set forth in the appendices to the appellate court's opinion.

STATEMENT

Section 5(a) of the Emergency Petroleum Allocation Act of 1973, as amended (Allocation Act), 15 U.S.C. (Supp. V) §754(a), incorporates by reference §210 of the Stabilization Act. Section 210, entitled "Suits for Damages or Other Relief," creates a private right of action for violations of the Stabilization Act, the Allocation Act and regulations issued thereunder and provides for recovery of damages and in some circumstances treble damages where a purchaser has been overcharged. Section 210(b)(2), however, contains a jurisdictional prerequisite to an action for an overcharge, namely, unless it can be shown that an overcharge is

> willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller . . . a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

Section 208, entitled "Sanctions; criminal fine and civil penalty," provides:

(a) Whoever willfully violates any order or regulation under this title shall be fined not more than $5,000 for each violation.

(b) Whoever violates any order or regulation under this title shall be subject to a civil penalty of not more than $2,500 for each violation.

Petitioners filed this action in the United States District Court for the Eastern District of Texas and sought declaratory and injunctive relief and monetary damages for certain actions allegedly committed by respondents, Longview Refining Company (Longview) and Crystal Oil Company (Crystal), in violation of the Stabilization Act and the Allocation Act.[1] The district court filed its findings of fact and conclusions of law and rendered judgment for petitioners against respondents in the amount of $518,053.71, plus interest and attorneys' fees. The district court found that during the two relevant time periods—the freeze period, June 13, 1973 through August 19, 1973, and the price formula period, November 1, 1973 through February 28, 1974[2]—one or both of the respondents overcharged

[1] Petitioners original complaint also asserted violations of the Sherman and Clayton Acts and of the parties' supply contract and the termination provisions of Article 2.309(e) of the Texas Business and Commerce Code. The district court, however, severed the claims arising under the Stabilization Act and the Allocation Act and advanced them on the trial docket. The decisions of the trial court and the Temporary Emergency Court of Appeals relevant to the instant petition for writ of certiorari relate solely to claims asserted under the Stabilization Act and the Allocation Act.

[2] The freeze period was implemented pursuant to Executive Order No. 11723, 38 F.R. 15763 (June 15, 1973). The price formula period began under the Phase IV program of economic controls. The relevant price formula regulations issued during Phase IV became effective August 19, 1973. 38 F.R. 22536 (August 22, 1973). Subsequently, the Federal Energy Office assumed responsibility over

petitioners in sales of motor gasoline and diesel fuel. The district court held that petitioners' failure to present claims for refund on respondents prior to instituting their civil action was of no consequence because respondents' overcharges were willful. (Pet. App. D.)

The Temporary Emergency Court of Appeals reversed. It held that the district court's finding of willfulness, as a basis for not requiring a pre-litigation presentment of claims to respondents, was based upon the erroneous conclusion of law that the civil meaning of willfulness was controlling for purposes of § 210 of the Stabilization Act. The court observed that § 210(b)(2) explicitly refers to a criminal standard of willfulness in § 208(a), that a number of courts have recognized the applicability of a criminal standard in this context,[3] and that the Stabilization Act's legislative history confirms this conclusion.[4] (Pet. App. A at 11-14). Further, the court held

> that to establish a willful overcharge there must be an intentional violation of a known legal duty, that is to say, to be willful an overcharge must have been made with the specific intention of charging a price which the defendant knew was in excess of the ceiling price allowable under the applicable pricing law and regulations. . . .
> (Pet. App. A at 16.)

petroleum-related controls and promulgated its own price formula regulations under the Stabilization Act and the newly-enacted Allocation Act. 39 F.R. 1924 (January 15, 1974).

[3] Manning v. University of Notre Dame du Lac, 484 F.2d 501, 503 (T.E.C.A. 1974); United States v. Gulf Oil Corp., 408 F. Supp. 450, 463 (W.D. Pa. 1975); United States v. Futura, 339 F. Supp. 162, 165 (N.D. Fla. 1972).

[4] Conf. Rep. No. 92-753, 2 U.S. Code Cong. & Admin. News, 92d Cong., 1st Sess. 2307, 2310 (1973).

The court also ruled that the district court failed to make any findings of the amount of overcharges in any sum certain and that with respect to the price formula period, the district court misapplied the relevant regulations.

The court remanded the case to the district court "for a determination of both the existence and the willfulness of any overcharge by defendants during the periods in controversy pursuant to the criminal standard of willfulness." (Pet. App. A at 16-17.) [5] The court subsequently denied a petition for rehearing and a suggestion of rehearing *en banc* (Pet. App. C; Resp. App. A).

ARGUMENT

The Temporary Emergency Court of Appeals correctly held that the word "willful" in §210(b)(2) of the Stabilization Act is used in the criminal sense and requires an intentional violation of known legal duty. This conclusion is fully supported by the language of the statute, its legislative history, and judicial construction of this and similar statutes. There is no conflict on this issue within the Temporary Emergency Court of Appeals, which denied petitioners' request for rehearing and suggestion of rehearing *en banc*. Indeed, the emergency appeals court followed its earlier decision in *Manning* v. *University of Notre Dame du Lac, supra*, 484 F.2d at 503-04, construing the "willful overcharge" requirement in §210(b)(2) "in the criminal sense." Further, the Temporary Emer-

[5] On remand, the district court was directed to order the Federal Energy Administration to be joined as a party to the litigation in view of its expertise in the interpretation, application, and enforcement of the statutes and pricing regulations in controversy.

gency Court of Appeals has exclusive jurisdiction over cases arising under the Stabilization Act and Allocation Act (Pet. App. A at 4 n.4). The court's opinion was based on its special familiarity with those Acts and their implementation. The court's treatment of the word "willful" is also consistent with prior decisions of this Court.

The issue of willfulness is threshold in nature. The district court's improper application of the civil standard of willfulness in and of itself requires reversal and remand. The presentation of claims for overcharges by petitioners to respondents prior to instituting the action below is a prerequisite to that court's jurisdiction, unless, of course, petitioners can demonstrate criminal willfulness on remand.

As to the ancillary issues addressed by the Temporary Emergency Court of Appeals, i.e., whether specific findings were required as to individual overcharges and whether the district court misapplied Agency regulations, they similarly do not present questions as to which a conflict exists within the Temporary Emergency Court of Appeals. Moreover, these issues are insubstantial in importance and merely relate to the inadequacy of findings of fact or the misapplication of Agency regulations.

1. Section 210(b)(2) of the Stabilization Act precludes the filing of a civil action to recover an overcharge prior to the time "a bona fide claim for refund of the overcharge" has been presented to the seller. This presentment of claims requirement is waived only where it can be demonstrated that the overcharge was "willful within the meaning of section 208(a)." It is

undisputed on the record that petitioners did not present respondents with claims for refunds of overcharges prior to instituting the action below. Thus, to satisfy the jurisdictional requirement, petitioners assert that the overcharges were "willful."

The terms of § 210 of the Stabilization Act could hardly be more clearly expressed. Section 210(b)(2) explicitly refers to § 208(a) for the meaning of the word "willful," and § 208(a) without question relates to the imposition of a criminal fine and is thus criminal in nature., Furthermore, the Temporary Emergency Court of Appeals has previously found that based on the language of § 210(b)(2) and its legislative history, the word "willful" is used "in the criminal sense." *Manning* v. *University of Notre Dame du Lac, supra,* 484 F.2d at 503-04.[6]

The standards to be applied in § 208(a) proceedings have also been previously considered by the courts. In *United States* v. *Futura, supra,* 339 F. Supp. at 165, the court held that § 208(a) was penal in nature and that Stabilization Act violations were "predicated upon a showing or finding of *scienter,* i.e. willful disobedience of the Act or regulations by the offender."[7] Simi-

[6] That case involved the question of whether the district court erred in dismissing an action on the grounds that appellants had failed to seek a refund from appellee prior to instituting an action for overcharges under the Stabilization Act. Absent an allegation that the overcharge was willful in a criminal sense, the appeals court affirmed the district court's dismissal, finding that the complaint failed to state a cause of action.

[7] Based on a review of the relevant legislative history, the court concluded "that Congress did in fact intend that a crime be created and did intend to provide for criminal punishment for violation thereof." Id. at 165-66.

larly, in *United States* v. *Gulf Oil Corp., supra,* 408 F. Supp. at 463, the court ruled that:

> The Congress in enacting § 208(a) of the Economic Stabilization Act, intended that those refiners who, with bad motive or criminal intent, refused to comply with the regulations passed pursuant to the Act, would thereby be subjected to criminal fines. . . .

2. Section 210(b)(2) reflects a well-conceived congressional judgment that non-judicial settlements of overcharge claims should be encouraged. It does not bar a civil action. Rather, if a seller refuses to refund an asserted overcharge within ninety days of the presentation of a claim, the purchaser may then bring suit for recovery of overcharges pursuant to § 210. The Congress recognized that the only circumstances in which the presentment of claims requirement would not be applicable is where the overcharge is willful in a criminal sense. In discussing § 210, the Conference Committee stated: "The House Bill also provided that the term 'willful' shall have the same meaning as in the case of criminal willfulness. . . . The Conference accepted the House provisions." Conf. Rep. No. 92-753, 2 U.S. Code Cong. & Admin. News, 92d Cong., 1st Sess. 2307, 2310 (1973).

3. In the context of the Federal tax laws, this Court has recognized that the concept of willfulness in criminal statutes invokes a criminal standard. In *United States* v. *Bishop,* 412 U.S. 346, 361 (1973), the Court acknowledged that the word "willfully" generally means "a voluntary, intentional violation of a known legal duty" and that:

> The Court's consistent interpretation of the word "willfully" to require an element of *mens rea* im-

> plements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers.

A similar result obtained in the Court's recent decision in *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976). In connection with the standard applicable to the willful filing of false income tax returns, the Court held that willfulness means "a voluntary, intentional violation of a known legal duty."[8]

4. On the basis of the foregoing, it is apparent that the Temporary Emergency Court of Appeals was correct in rejecting the district court's less demanding, civil standard of willfulness for purposes of actions instituted under §210(b)(2) and holding

> that to establish a willful overcharge there must be an intentional violation of a known legal duty, that is to say, to be willful an overcharge must have been made with the specific intention of charging a price which the defendant knew was in excess of the ceiling price allowable under the applicable pricing law and regulations. . . .
> (Pet. App. A at 16.)

5. As to the remaining, ancillary issues raised by petitioners, none warrants review by this Court.

First, the court below correctly found that the district court simply failed to make findings of over-

[8] In so doing, the Court approved a number of cases recognizing the need for intentional conduct in violation of a known legal duty, not just negligent conduct, as constituting a prerequisite to a finding of willfulness. See, e.g., United States v. Pohlman, 522 F.2d 974, 976 (8th Cir. 1975) (en banc), cert. denied, 423 U.S. 1049 (1976); United States v. McCorkle, 511 F.2d 482, 484 (7th Cir.) (en banc), cert. denied, 423 U.S. 826 (1975).

charges as to any individual petitioner in any specific amount.[9] The district court's action ignores established precedent, e.g., *Kelley* v. *Everglades Drainage Dist.*, 319 U.S. 415 (1943); *Evans* v. *Sun Tree Growers & Shippers, Inc.*, 531 F.2d 568 (T.E.C.A. 1976), and was appropriately held to be erroneous by the appellate court.

Second, for the violations allegedly arising under the price formula regulations, the Temporary Emergency Court of Appeals recognized that the district court ignored specific language in Agency regulations and administrative interpretations thereof. Without belaboring the errors committed by the district court, many of which are spelled out in the opinion of the court below (Pet. App. A at 22-38), it should be noted that specific language of key Agency regulations was disregarded,[10] and administrative interpretations thereof were not taken into account.[11] In hopes of avoiding similar errors and omissions on remand, the district court will have the benefit of the Federal Energy Administration's expertise, since the Temporary Emer-

[9] In this regard, the court below observed:

> [T]he district court's findings as to the facts relevant to the proof of any overcharges alleged in the plaintiffs' complaint are not sufficiently specific to substantiate concluding there was an overcharge by the defendants in any sum certain as to any individual plaintiff. (Pet. App. A at 11.)

[10] E.g., 6 C.F.R. § 150.355; 10 C.F.R. §§ 212.82(f), 212.83(e)(2), 212.83(e), and 212.91.

[11] E.g., Getty Oil Co. (Eastern Operations), Inc., Skelly Oil Co., 1975 CCH Energy Management Transfer Binder ¶ 83,041 (February 11, 1975); Esso Standard Oil S.A. Ltd., 1974 CCH Energy Management Transfer Binder ¶ 20,748 (December 20, 1974); Kerr-McGee Corp., 1974 CCH Energy Management Transfer Binder ¶ 20,658 (September 12, 1974).

gency Court of Appeals has directed the district court to order the Agency to be joined as a party to the litigation (Pet. App. A at 38-39).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 27, 1977

APPENDIX

APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 5-17

LONGVIEW REFINING COMPANY AND CRYSTAL OIL COMPANY,
Appellants,

v.

W. R. (BILL) SHORE, et al., *Appellees.*

BEFORE HONORABLE JOE INGRAHAM, HONORABLE MARTIN D. VAN OOSTERHOUT, AND HONORABLE JOE EWING ESTES, JUDGES

Upon consideration of plaintiffs-appellees' Suggestion of Rehearing *En banc,*

IT IS ORDERED that said Suggestion is denied.

FOR THE COURT:

/s/ RUTH H. JACOBSON
Ruth H. Jacobson
Clerk

March 23, 1977